Supreme Court, U.S.
FILED
JAN 19 1995
OFFICE OF THE CLERK

No. 94-917

In The

Supreme Court of the United States

October Term, 1994

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., et al.,

Petitioners,

v.

CITY OF COLUMBIA, SOUTH CAROLINA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

Respondents' Brief In Opposition To Petition For Writ Of Certiorari

---

Katharine I. Butler
University of South Carolina
School of Law
Corner of Green & Main St.
Columbia, SC 29208
(803) 777-4155

James S. Meggs
Counsel of Record
1737 Main Street
P.O. Box 147
Columbia, SC 29217
(803) 733-8247

BEST AVAILABLE COPY

56 pp

Helen T. McFadden
201 Short Street
P.O. Box 1114
Kingstree, SC 29556
(803) 354-5200

Attorneys for Respondents

RESTATED QUESTIONS PRESENTED

Whether the district court correctly anticipated the principles announced in Johnson v. De Grandy, 114 S.Ct. 2647 (1994) when it gave substantial, but not outcome determinative, weight in its Section 2 "totality of the circumstances" analysis to the fact that the challenged election plan had consistently resulted in near proportional representation for the city's African American voters?

Whether this case is an appropriate vehicle to review a conflict in the Circuits concerning the appropriate weight to be given to the success of black supported white candidates when none of the ultimate conclusions of the district court would be affected by resolution of the issue?

Whether granting certiorari can be justified in this case to review the district court's factual finding that a black candidate can be elected to an at-large position in the City of Columbia?

Whether granting certiorari is appropriate in this case, regardless of the importance of the issues, where even resolving all issues raised in favor of the petitioners will not result in reversal of the lower court's decision?

TABLE OF AUTHORITIES

African American Voting Rights Legal Defense Fund, Inc. v. Villa, 999 F.2d. 1301 (8th Cir. 1993), vacated and remanded sub nom., Tyus v. Bosley, 114 S.Ct. 2776 (1994)... 28

City of Bridgeport, Conn. v. Bridgeport Coalition for Fair Representation, 26 F.3d. 271 (2nd Cir. 1994), vacated 115 S.Ct. 35 (1994)... 29

Crowe v. Emison, 507 U.S. _____, 113 S.Ct. 1075 (1993)... 20, 46

Johnson v. De Grandy, 512 U.S._____, 114 S.Ct. 2647 (1994)... 1, 20, 21, 22, 24, 26, 27, 28, 45

McWherter v. RWTAAAC, 836 F.Supp. 453 (W.D. Tenn. 1993), vacated 114 S.Ct. 2775 (1994)... 29

Thornburgh v. Gingles, 478 U.S. 30 (1986)... 24, 36, 38

Voinovich v. Quilter, 507 U.S._____, 113 S.Ct. 1149 (1993)... 19

Whitcomb v. Chavis, 403 U.S. 124 (1971)... 25

TABLE OF CONTENTS

RESTATED QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE 1
A. Proceedings
B. Findings and Conclusions of the District Court.....2
C. Respondents' clarification of "facts" included in Petitioners' statement of the case.....8
D. Opinion of the Court of Appeals 16

REASONS FOR DENYING THE WRIT

I. The District Court's ultimate determination that the plaintiffs had failed to establish a violation of Section 2 was not based upon "proportionality as a safe harbor" and thus is not in conflict with De Grandy.....17

A. The District Court specifically refused to find that near proportionality was a safe harbor.....17

B. The District Court's analysis is consistent with De Grandy's affirmation that the group's election of a nearly proportional share of the governing body's seats is highly probative of the existence of equal political opportunity...21

C. This case is distinguishable from other cases this Court has remanded for reconsideration in light of De Grandy.....28

II. This case is an inappropriate vehicle through which to resolve the split in the circuits on the weight to be given in a Section 2 analysis to minorities' ability to elect white candidates because the matter was not dispositive of the outcome determinative conclusions reached by the District Court.....30

A. Petitioners have mischaracterized the weight the district court placed upon the success black voters have experienced in electing white candidates for the at-large seats.....31

B. While the District Court considered black voters' ability to elect white candidates to be a relevant consideration, this factor was not dispositive either as to the existence of Gingles' preconditions or as a part of the totality of the circumstances analysis.....34

III. The District Court's finding that a black candidate can be elected at large in the City of Columbia is a finding of fact, subject to review by an appellate court only on a "clearly erroneous" standard.....41

IV. The Court should deny certiorari in this case because none of the issues raised by the plaintiffs will require reversal of the decision of the district court.....45

STATEMENT OF THE CASE

A. Proceedings. Respondents supplement the Petitioners' statement as follows: Following presentation of the plaintiffs' case, the defendants moved for judgment as a matter of law on the grounds that the challenged electoral plan's inclusion of two majority black districts from which black candidates had been consistently elected to the council guaranteed the plan's validity under Section 2. The motion was denied. Pet. App. 55.

After the briefs were prepared on appeal, but before the oral argument, this Court handed down Johnson v. De Grandy, 512 U.S. _____, 114 S.Ct. 2647 (1994). At oral argument before the Fourth Circuit Court of Appeals, the parties fully explored De Grandy's impact on the

district court's decision.

B. Findings and Conclusions of the District Court.

The challenged 4-2-1 plan (four council seats elected from single member districts, two council seats elected at large, one mayor elected at large) was adopted by City-wide referendum in 1981, after the City had successfully defended its all at-large system against a racial vote dilution claim. A majority of the then all white City Council and many prominent white civic leaders supported 4-2-1. An estimated 98.9% of African American voters supported 4-2-1, which passed with 26.9% of the white vote. Pet. App. 23.

In 1983 African Americans were elected to the two majority black districts in the first election held under the plan and have been reelected up to the

present time. It is undisputed that these candidates were and are the choices of the black electorate.

The two majority black districts represent 33.3% of the seats on the Council that are susceptible to election from single member districts. Petitioners do not claim that the Mayor, the seventh member of Council, could be elected from a single member district. (Pet.App. 68 n.29)

African Americans comprise between 38.5 and 40.5% of the City's eligible electorate. (Pet.App.24 n.4) Thus, their demonstrated ability to control the election in two of the six seats susceptible to election from single member districts provides them with "electoral control" roughly equal to their percentage of the electorate.

Black voters have not been politically cohesive in their support of

black candidates for the at-large seats. Five black candidates have run for the at-large seats since the adoption of 4-2-1. One received only 11.1% of the black vote. Another received only 21.9% of the black vote. A third was supported by only a bare majority of black voters at the polls (53.6%). The District Court found that this candidate would have been elected had black voters at the polls been as cohesive in supporting her as they had been in their support of other candidates. (Pet. App. 41, n.14.)

The remaining two black candidates received higher levels of support from the blacks who turned out for their elections, but black turnout was very low. The first of these candidates was supported by a mere 1284 of the 14,307 then registered black voters, the second by a mere 785 of 14,568 black registrants. The District

Court concluded that, "in light of the demonstrated ability of blacks to turn out, even in city elections, the failure of blacks to participate in these [two] contests must be seen as lack of enthusiasm for the candidates offering for election." Pet. App. 42.

Four additional black candidates ran for at-large offices in the City in 1978, prior to the adoption of 4-2-1 and at a time when the black percentage of the electorate was lower. Plaintiffs' expert estimated that black voters at the polls for that election provided the following levels of support for those candidates: Redfern for mayor, 33.1%; for Council, Clarkson 36.8%, Cromartie 52.0%, and Gilbert 31.0%. (Pet. App. 71-72)

Black candidates running at-large for the City Council are not usually being defeated by white bloc voting. Black

candidates' losses in their bids for the at-large Council seats are not attributable to white bloc voting when black voters are unenthusiastic in their support. Pet. App. 44. Analyses of other elections involving the City's voters indicated that when black voters were enthusiastic in their turnout and cohesive in their support of black candidates, sufficient white support to elect these candidates was forthcoming. Moreover, numerous politically astute witnesses, both black and white, testified that today a black candidate could be elected at-large. Pet. App. 45.

If white candidates finishing first among black voters are considered to be "candidates of choice," black voters' choices have not usually been defeated. If all candidates who finished first (or in the one "vote for two" contest, second)

among black voters are considered to be "candidates of choice," there is no need to determine if "white bloc voting" was responsible for their defeat. In seven of eleven contests for at-large positions, the candidate finishing first among black voters was elected. With one exception, black candidates always out polled white candidates among black voters. Beyond that, however, white first place finishers among black voters in white-white contests are virtually indistinguishable from black first place finishers in terms of levels of support furnished by blacks at the polls. Black support for the black candidates is described above. Two of the seven white candidates received a greater absolute number of black votes than any of the black candidates who were defeated. The remaining five received support from percentages of the black registrants

greater than or comparable to the percentages received by the defeated black candidates. See, tables. Pet. App. 74,75.

Based on the totality of the circumstances, black voters do not have less opportunity to participate in the political process and to elect legislators of their choice than others in the electorate. Considering all the evidence, including the Gingles preconditions, all the Senate Report factors, and other relevant evidence, including the fact that black voters control two of the six non-mayoral Council seats, the District Court concluded that plaintiffs had failed to establish their case. The court's findings are reported in the opinion.

C. **Respondents' clarification of "facts" included in the petitioners' statement of the case.**

1. Petitioners report that in black-

white contests for at-large seats in the city, whites voted for white candidates at the average level of 94% and blacks voted for black candidates at the average level of 74%. The District Court reported these figures, but made no use of them because of the manner in which they were calculated. Pet. App. 36 - 37, 39. The plaintiffs' expert combined the votes received by all black candidates to calculate the black vote for black candidates and did the same for white candidates. For example, in 1978 three blacks ran for two seats on the council. The combined percentage of blacks voting for these candidates was 119.8%, a figure included in the expert's average. For another example, in 1983, the only "vote for two" election under 4-2-1, black candidate Simkins received support from 52.3% of blacks at the polls, and black

candidate Scott received support from 21.7% of blacks at the polls. Plaintiffs' expert combined these figures to show that black candidates received 74% of the black vote. (Pet. App. 72) Simkins and Scott were in fact opponents, although it was possible to vote for both of them. It was not possible to determine how many blacks voted for both Simkins and Scott. The District Court found the more probative information from this election to be that neither candidate received particularly high levels of black support. The Court also found it significant that there were sufficient black voters at the polls in this election to have elected one of these black candidates, had black voters been more cohesive in their support. The Court noted, "To say that voters who have split their vote among two or more candidates are 'cohesive' is contrary to political

reality." Pet. App. 39 - 40. The Court further observed that following plaintiffs' expert's reasoning, black voters could split their vote among five black candidates and be deemed cohesive, even if concentrating on one would have elected him. Id. n. 12

Plaintiffs' expert's calculations of black support received by each black candidate, some of whom ran prior to the adoption of 4-2-1 is reported in an appendix to the district court's opinion. Pet. App. 71-73. Individual black candidates received the following levels of support from blacks at the polls for their elections: 33.1%; 36.8%; 52.0%; 31.0%; 52.3%; 21.7%; 63.9%; and 84.8%. Id. One additional black candidate received only 11% of the black vote. On average then, black voters supported all black candidates at a rate of 48.3%. By

way of comparison, 98.9% of black voters supported the adoption of 4-2-1.

2. Petitioners indicate that the basis for the District Court's not finding "legally significant" polarized voting was that if whites elected with black support and blacks elected from majority black districts are counted as blacks' candidates of choice, their choices have not usually been defeated. Pet. Br. 5-6. The District Court made these findings, but they were not the basis for its ultimate conclusion on the issue of legally signficiant polarized voting. Rather, the conclusion was based upon the court's finding that insufficient support from black voters was responsible for the defeat of blacks who had run for at-large seats under 4-2-1. The court also relied upon its finding that a black candidate who received solid black support -- black

support such as had been demonstrated by these same black voters in other elections -- would receive sufficient white support to be elected.

3. Petitioners set up an alternative set of assumptions to those made by the District Court when it concluded that white bloc voting was not a barrier to a black candidate's election at large. Pet. Br. 6-7. Based on their assumptions, petitioners conclude, in direct opposition to the finding of the District Court, that a black candidate cannot be elected at large. The petitioners' conclusion on this point was clearly rejected by the lower court. They may not simply substitute their own contrary "facts" without first demonstrating that the District Court's actual findings of fact are clearly erroneous and that the "facts" they now

offer are so clearly correct as to be "found" by this court as a matter of law.

4. Petitioners assert that the District Court's standard for determining a Section 2 violation was "whether the protected voting group has a voting opportunity that relates favorably to the group's population in the jurisdiction for which the election is held." The actual meaning of this statement by the court would require an examination of the cases it cites. Suffice it to say, for purposes of this Petition, the court was not adopting a "standard for determining a Section 2 violation." The standard the court applied is spelled out in its opinion and includes the Gingles preconditions and a totality of the circumstances analysis. A cursory reading of the opinion demonstrates that the court not only set this standard out, but

carefully considered each of its elements as applied to the facts adduced at trial to reach its ultimate conclusions.

5. Petitioners indicate that the basis for the court's failure to find 4-2-1 violative of Section 2 was "because it 'provides black voters with an opportunity to elect candidates of its choice that relates favorably to the group's population in Columbia.'" Pet. Br. 8. Again, a cursory reading of the opinion demonstrates that the court's conclusion was based first on plaintiffs' failure to establish the preconditions, and second, even assuming they were established, on the court's totality of the circumstances analysis. The group's ability to control two of six seats susceptible to election from single member districts (33.3%) was an important factor, but not the only factor: "No one factor is outcome

determinative; rather, the conclusion is based upon the record, taken as a whole, so as to provide an intensely local appraisal of African Americans' ability to participate in the political process in light of past and present reality in the City of Columbia." Pet. App. 70.

D. **The Opinion of the Court of Appeals**. The appeals court in a per curiam opinion indicated that a statement in the District Court's opinion was at odds with De Grandy, but nevertheless affirmed the judgment.

REASONS FOR DENYING THE WRIT

I. The District Court's ultimate determination that the plaintiffs had failed to establish a violation of Section 2 was not based upon "proportionality as a safe harbor" and thus is not in conflict with De Grandy

A. The District Court specifically

refused to find that near proportionality was a safe harbor.

Petitioners incorrectly characterize the District Court's ultimate conclusions in this case as having been based upon an "erroneous safe harbor analysis." (Pet. Br. 11) In fact, the District Court specifically refused to decide the case proportionality grounds. The City moved for judgment as a matter of law on the very ground that black voters' demonstrated control over the two district seats, representing 33.3% of the seats susceptible to election from single member districts, was sufficient to immunize 4-2-1 from attack. The court denied the City's motion. (Pet. App. 55.) Instead of finding the guarantee of near proportionality to be a "safe harbor," the court noted, "While 4-2-1's guarantee of black control of two districts is not

sufficient to immunize the plan from attack under Section 2, it is a significant factor in the totality of the circumstances analysis." (Pet. App. 56.)

Rather than giving outcome determinative weight to near proportionality, the District Court conducted a full trial on the merits of this case, considering evidence of the Gingles preconditions, the Senate Report factors, as well as other evidence relevant to the opportunities available to Columbia's black citizens to participate in the political process and to elect candidates of their choice. The District Court's opinion contains an extensive recitation of the facts it found in support of its ultimate conclusion that plaintiffs had failed to establish a violation of Section 2.

The District Court's judgment rested

on three conclusions, each alone sufficient to support it. First, the Court concluded that the plaintiffs had failed to establish that African Americans were politically cohesive in their support of black candidates who had run for the at-large seat. Second, they failed to establish that their candidates of choice were usually defeated by a bloc voting majority. Failure to establish the preconditions is fatal to the petitioners case. Voinovich v. Quilter, 507 U.S. ___, 113 S.Ct. 1149 (1993); Crowe v. Emison, 507 U.S. ___, 113 S.Ct. 1075 (1993) ("Plaintiffs in Crowe and Voinovich failed to show vote dilution because the former did not prove political cohesiveness of the minority group ... and the latter showed no significant white bloc voting ..." Johnson v. De Grandy, 512 U.S. ___, 114 S.Ct. 2647, 2655 (1994).

The District Court did not end its analysis with the preconditions. Instead the Court further held that even if the preconditions were satisfied, plaintiffs failed to carry their burden of proof to establish, based on the totality of the circumstances that blacks have less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice. One factor considered by the District Court was the fact that the challenged plan provided blacks with control over two of the six council seats (33.3% of the seats susceptible to election from single member districts.) Blacks make up roughly 40% of the electorate. There was no dispute that blacks had elected their candidates of choice to these seats since the adoption of the election system.

B. The District Court's analysis is

consistent with De Grandy's affirmation that the group's election of a nearly proportional share of the governing body's seats is highly probative of the existence of equal political opportunity.

The District Court's reliance on the group's ability to elect candidates of its choice is absolutely consistent with De Grandy. In De Grandy this Court held that the lower court erred when it failed to afford proper weight to the fact that the challenged plan in fact provided minority voters with effective districts roughly equal to their proportion of the electorate, despite the presence of polarized voting.

This Court's refusal to recognize a "safe harbor" for proportionality in De Grandy does not invalidate the analysis underlying the District Court's ultimate conclusion in this case. De Grandy

clearly recognized that the degree to which a group can elect candidates of its choice is probative. The refusal to recognize a safe harbor for "proportionality in terms of districts" was based upon the concern that such districts, despite the presence of a majority of minority members, might not be ones in which the minority group could elect its choices. Impediments to access might mean that the safe harbor "for [the s]tate would thus not be safe for the voters." 114 S.Ct. at 2661.

The "near proportionality" weighed by the District Court in the instant case was based upon the demonstrated ability of black voters to elect their choices in the majority black districts. Thus, no impediments prevented blacks from taking advantage of their majority status in these districts. Nor were there any

impediments in Columbia to African Americans registering to vote, casting ballots, and participating in all forms of political activity, including running for office.

The District Court did not give outcome determinative weight to proportionality. The District Court did indicate that "when an electoral system has resulted in near proportional representation for a protected group, it cannot violate section 2." The court supported this statement with a quotation from Gingles ," '...persistent proportional representation is inconsistent with appellee's allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.' 478 U.S. at 77." (Pet. App. 64) The court then went on to

note that the District 23 holding "is not clearly dispositive here" because" control of two seats is not precisely proportional representation." Pet. App. 65 [1]

---

[1] Petitioners also contend that the District Court failed to give appropriate weight to the group's failure to achieve actual proportional representation, as contrasted with "near" proportionality. Pet. Br. 12. Petitioners seem to suggest that "three of the six" non-mayoral council seats is the appropriate measure of "undiluted" black voting strength because if six single member districts were created, it would be possible to create an additional majority black district. This is very close to the "maximization" argument rejected in De Grandy. Petitioners offer no other explanation for why control of two district seats and substantial, actually demonstrated, influence over the mayor and two at-large seats is not "fair" representation for a group that constitutes 40% of the electorate. Essentially, petitioners argue that Section 2 entitles blacks to elect black candidates to the city council in numbers equal to their percentage of the population. When considering whether they have elected their "fair share of black candidates" to the council, they argue that the court must consider the mayor, because he votes on Council matters, even though he cannot reasonably be elected from a single member district. Even if

Later the District Court indicated that black control of the two seats was an important factor in its totality of the circumstances analysis, but also stated:

> No one factor is outcome determinative; rather, the conclusion is based on the record, taken as a whole, so as to provide an intensely local appraisal of African Americans' ability to participate in the political process in light of past and present reality in the City of Columbia.

(Pet. App. 70.)

---

there were some theory to support finding that "three of seven" is the appropriate measure of "undiluted minority voting strength," this would be only the first step. Plaintiffs have not demonstrated that the failure of a black candidate to capture the third seat is a result of a "built-in bias against [black voters] rather than merely a function of losing elections. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971). Whatever the "measure of undiluted voting strength," the District Court concluded that plaintiffs had not established that blacks' failure to achieve it was the product of vote dilution. They have not argued that the District Court's conclusion based on the totality of the circumstances was clearly erroneous.

The District Court could not have been more faithful to the principles announced in De Grandy if it had had the opinion in hand. Any suggestion to the contrary that comes from the Court of Appeals disapproval of a single sentence fragment in the District Court's opinion is totally belied by the opinion itself. The Court of Appeal's unpublished per curiam opinion affirming the judgment notes, "We do, however, find that the district court's statement that 'when an electoral system has resulted in near proportional representation for a protected group, it cannot violate Section 2,'... conflicts with the Supreme Court's holding in De Grandy that proportionality, by itself, is not dispositive of a Section 2 claim. ... Accordingly, we affirm on the district court's primary reasoning that plaintiffs failed to satisfy the three

Gingles preconditions." (Pet. App. 7)

As noted above, and as a mere cursory reading of the District Court's opinion will confirm, the court's use of near proportionality was absolutely consistent with De Grandy. Justice O'Connor's characterization of the majority opinion in De Grandy fully captures the District Court's approach to proportionality used in this case:

In sum, the Court's carefully crafted approach treats proportionality as relevant evidence, but does not make it the only relevant evidence. In doing this the Court makes clear that [sec] 2 does not require maximization of minority voting strength yet remains faithful to [sec] 2's command that minority voters be given equal opportunity to participate in the political process and to elect representatives of their choice.

114 S.Ct. at 2664. (O'Connor, concurring)

C. This case is distinguishable from other cases this Court has remanded for reconsideration in light of De Grandy.

This Court has remanded three cases for reconsideration in light of De Grandy. All are distinguishable from the instant case. In African American Voting Rights Legal Defense Fund, Inc. v. Villa, 999 F.2d. 1301 (8th Cir. 1993), vacated and remanded sub nom., Tyus v. Bosley, 114 S.Ct. 2776 (1994)..., the District Court granted summary judgment on the ground that proportional representation precluded a Section 2 challenge. No summary judgment was granted in the instant case. The District Court specifically refused to find that provision of two majority black districts in the 4-2-1 plan was sufficient to immunize it from section 2 challenge.

The other cases were McWherter v. Rural W. Tenn. African - American Comm., 836 F.Supp 453 (W.D. Tenn, 1993), vacated, 114 S.Ct. 2775 (1994) and City of Bridgeport Conn. v. Bridgeport Coaltion for Fair Representation, 26 F. 3d 271 (2nd. Cir. 1994) In both cases plaintiffs challenged single member district plans in which some majority minority districts were included, but more were possible. In both cases the lower courts agreed that if polarized voting was present, Section 2 required the creation of additional minority districts, if such were possible. Thus, these cases were "maximization cases," arguably in conflict with De Grandy. In the instant case, the District Court considered the fact that if all the Council members were elected from single member districts, one additional majority black district could be created. The

court did not have to consider whether "maximization" was required because it concluded that the plaintiffs had failed to prove their case.

II. **This case is an inappropriate vehicle through which to resolve the split in the circuits on the weight to be given in a section 2 analysis to minorities' ability to elect white candidates because the matter was not dispositive of the outcome determinative conclusions reached by the District Court.**

A. Petitioners have mischaracterized the weight the District Court placed upon the success black voters had experienced in electing white candidates for the at-large seats.

Petitioners argue that the District Court's decision is in conflict with decisions of other Courts of Appeal. They assert, "The decision below that minority

voting strength is not diluted because blacks can often vote for winning white candidates conflicts with the decisions of other courts of appeal[ ][sic]. " (Pet. Br., 13).

By raising this issue, Petitioners give the impression that the decision of the lower court was based on a conclusion that the City's black voters could elect white candidates of their choice to the at-large positions in the City, which was sufficient to establish equal political opportunity, even if they were unable to elect black candidates to these positions. They write, "Black voters in Columbia may be able to elect, or vote for, a candidate of their choice to an at-large seat - but only so long as the candidate is white. The notion that black citizens have equal political opportunities under such circumstances is without merit." (Pet.

Br. 14.)

Petitioners' characterization of the District Court decision as standing for the proposition that "minority voting strength is not diluted because blacks can often vote for winning white candidates" is blatantly misleading. The District Court's conclusion that black voting strength was not diluted by the City's mixed electoral system did not turn on the ability of black voters to elect white candidates. Rather, its decision was based upon the petitioners' failure to establish the Gingles preconditions, and alternatively upon the court's conclusion based on the totality of the circumstances that black voters had political opportunities equal to those of others in the electorate. Black voters' ability to elect white candidates was not essential to the District Court's conclusions that

the preconditions had not been satisfied and was but one factor considered in its totality of the circumstances analysis.

Petitioners are correct in observing that some confusion exists among the lower courts as to the weight to be attached to black voters' ability to elect white candidates. The District Court noted the confusion as well. (Pet. App. 32) Thus, this Court should at some point provide further guidance. However, the instant case is not an appropriate vehicle for resolving this conflict because the District Court's treatment of the issue was not essential to its ultimate conclusion that the plaintiffs had failed to prove their case. Important though the issue is, placing the burden of its resolution upon parties for whom it has no practical impact is unfair and unwise.

B. While the District Court

considered black voters' ability to elect white candidates to be a relevant consideration, this factor was not dispositive either as to the existence of Gingles' preconditions or as a part of the totality of the circumstances analysis

1. The District Court concluded that the plaintiffs had not established that blacks were politically cohesive, a conclusion that did not rely upon black voters' ability to elect white candidates to the at-large seats. Rather the conclusion was based on the following findings: (1) Black candidates for the at large seats lost because black voters were unenthusiastic in their support of them. Only three of the five black candidates for at-large seats under 4-2-1 received even a majority of black support. In one case, only a bare majority of black voters at the polls supported the candidate.

Greater support from blacks actually at the polls would have elected her. The other two black candidates running for the at-large seats received more substantial support from blacks at the polls, but failed to inspire the black community to turn out. One candidate was supported by a mere 1284 of the 14,307 black registrants and the other by mere 785 of 14,568 black registrants. (2) There are no barriers to black voter turnout in City elections as evidenced by their turning out at higher rates than whites on some occasions.

Lack of political cohesiveness in support of black candidates for the at-large seats indicated that if the black electorate had a political agenda vis a vis the Columbia City Council, it did not believe that electing these particular black candidates would further that

agenda. Thus, inclusion of some at-large seats in the City electoral plan "cannot be said ... [to] thwart [] distinctive minority group interests." Thornburgh v. Gingles, 478 U.S. 30, 51 (1986).

Despite having resolved the "politically cohesive" precondition against the plaintiffs, the District Court nevertheless considered whether white bloc voting was able to usually defeat the black electorate's candidates of choice. Here the Court answered two questions: were black voters' choices usually defeated and if so, was white bloc voting responsible? Obviously both "defeat" of the candidates and "responsibility attributed to white bloc voting" are essential to concluding the plaintiffs have satisfied this precondition.

2. Counting white candidates supported by black voters as "candidates

of choice" of black voters, their choices were not "usually" defeated. As to whether their choices for the at large seats were usually defeated, the answer turned on whether whites elected with black support in contests involving only white candidates "counted" as candidates of choice. The court concluded that if white candidates who finished first among black voters were considered to be the group's "candidates of choice," their choices had not "usually" been defeated. Candidates finishing first among black voters prevailed in seven of eleven contests for at-large positions in the City. The court discussed whether whites should "count", noted that the issue had not been resolved in Gingles, but never actually indicated that it was resolving the matter in favor of "counting" white

candidates.[2]

3. Black candidates of choice of black voters lost, but white bloc voting was not responsible. Its answer to the second question, "was white bloc voting responsible for the defeat of those choices who were defeated," rendered the court's consideration of whites as candidates of choice irrelevant. Even

---

[2] Analyses of all elections for at-large seats under 4-2-1 established that there were virtually no differences in the levels of support black voters gave their first choices in black-white and white-white contests. Given the even levels of support, calling the black, but not the white candidates "the blacks' choice," can be justified only by accepting the argument that black voters really want to vote only for black candidates, thus they have "no real choice" in white-white contests. In light of the obvious fact that all voters are limited to those candidates who offer for election, and the uncontroverted and overwhelming evidence that white candidates sought black votes and responded to black needs once in office, the argument that only "black candidates count" becomes a claim for proportional representation based on race, not political equality.

though the black candidates for the at-large seats who had finished first among blacks were defeated, the court concluded that white bloc voting was not responsible. As to the black candidates who had run for the at-large seats under the mixed plan, the court concluded that their defeat was just as rationally attributed to "blacks failure to vote more cohesively or to turn out at all as to [the candidates'] failure to achieve white support." Pet. App. 44. The court concluded that a black candidate more solidly supported by the black electorate would receive sufficient white support to be elected at large. Pet. App. 45.

The District Court considered how candidates supported by black voters had fared, even when those candidates were whites running without black opposition. Just as clearly, however, the court's

consideration of white-white contests played no role in its conclusion that black voters were insufficiently politically cohesive in support of black candidates to satisfy the Gingles' precondition. The success of white candidates also played no role in the court's conclusion that white bloc voting would not usually defeat black candidates. The black candidates who were unsuccessful in their bid for the at-large seats lost for all the reasons any candidate loses, including the failure to mobilize their core supporters. Thus, even if the court's consideration of the third Gingles precondition were limited solely to black candidates, its finding against the plaintiff stands.

The petitioners have not alleged that the finding of "lack of political cohesiveness" or the finding that black

candidates' losses cannot be attributed to white bloc voting are "clearly erroneous." Thus, determining that only black candidates "count" as "candidates of choice" will not alter the district court's ultimate conclusion. Plaintiffs failed to establish that black candidates lost because of white bloc voting.

III. **The District Court's finding that a black candidate can be elected at large in the City of Columbia is a finding of fact, subject to review by an appellate court only on a "clearly erroneous" standard.**

The Petitioners mischaracterize the district court's conclusion by suggesting that the court "[held] that minority voting strength was not diluted because it was theoretically possible for a black to get elected -- provided blacks turned out and voted cohesively at optimum levels,

and the black candidate got 25% of the white crossover vote." Pet. Br. 16. The District Court did not hold that the theoretical possibility of electing a black candidate was sufficient to defeat a racial vote dilution claim. Rather, as a part of its conclusion that white bloc voting would not usually defeat the minority group's candidates of choice, the District Court found that the opportunity for a black candidate to be elected to one of the at-large seats was present in the City.

Specifically, the court found that there were no impediments to black turnout; that black turnout, like white turnout, fluctuated with elections, candidates, and issues presented, but had at times been comparable to and even exceeded white turnout; that in numerous other election contests, black voters had

been highly cohesive in support of black candidates, as well as issues of interest to the community; that white voters had in other election contests provided black candidates with support sufficient to elect them to the city council, given the current racial make-up of the electorate; and that the opinions of numerous politically astute witnesses, both black and white that a black candidate could be elected at large were credible and persuasive. The petitioners have not alleged that any of the evidentiary findings or the court's ultimate factual conclusion are clearly erroneous.

The finding that a black candidate had the opportunity to be elected to an at large seat was only part of the support for the court's conclusion that black candidates were not usually defeated by white bloc voting. As noted above, the

court also specifically found that the black candidates who had run for City Council lost because they failed to generate support from the black electorate -- support commensurate with that the black electorate had given other candidates and other issues.

Section 2 provides that plaintiffs must prove that their opportunity to elect candidates of their choice is not equal to that of others in the electorate. It does not guarantee specific electoral results. Black voters and black candidates are subject to the same rules as other players in the political process. When the black candidates who have offered for election have not inspired minority voters to "pull, haul, and trade" on their behalf, plaintiffs can hardly complain when white voters fail to recognize these candidates' merits. See, De Grandy, 114 S.Ct. at

2661.

Moreover, even if the district court's finding on this issue were potentially clearly erroneous, the matter is not of sufficient policy importance to justify a grant of certiorari.

IV. The Court should deny certiorari in this case because none of the issues raised by the plaintiffs will require reversal of the decision of the district court.

Three grounds support the decision of the Court below that the petitioners failed to establish that the African American citizens of Columbia have less opportunity than others in the electorate to participate in the political process and to elect candidates of their choice. Each ground is alone sufficient to affirm the decision, thus petitioners are entitled to reversal only if they undercut

all three grounds.

The first ground is that petitioners failed to establish that they are politically cohesive in their support of candidates for the at large seats. (Gingles precondition 2) None of issues alleged in their petition impact on this finding. Petitioners have not asserted that the finding is clearly erroneous, or that it was arrived at through application of an impermissible legal standard. Regardless of the outcome of the issues raised in their petition, failure to demonstrate political cohesiveness is fatal to the petitioners' case. Crowe v. Emison, 507 U.S. ____, 113 S.Ct. 1075 (1993)

The second ground is that petitioners failed to establish that the choices of the black electorate are usually defeated by white bloc voting. Even if only black

candidates "count" as choices, the District Court's finding against the plaintiffs on this precondition is unaffected. The court specifically found that the black candidates who were defeated were not defeated by white bloc voting. The petitioners have not alleged that this finding is clearly erroneous, or that it was arrived at through application of an impermissible legal standard. At best they allege that one of the evidentiary findings underlying the court's ultimate conclusion of this issue is clearly erronous -- the finding that a black candidate can be elected at large in the City of Columbia. Correcting erroneous facts is not an appropriate basis to grant certiorari.

The third ground is that petitioners failed to present evidence sufficient to support a finding that, based on the

totality of the circumstances, the process leading to nomination and election are not equally open to participation by members of the group. The court indicated that,

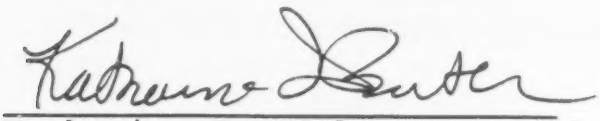
> Even if African Americans were politically cohesive, and even if white bloc voting had resulted in the defeat of African Americans' candidates of choice for the at-large seats, the court nevertheless finds that, in the totality of the circumstances, African Americans' ability to elect candidates and to participate in the political process is equal to that of others in the electorate.

(Pet. App. 70) At best, Petitioners can be read as alleging that the District Court placed too much emphasis on the "near proportionality" guaranteed to black voters by the majority black seats in the mixed electoral plan. They fail to allege, however, that having placed a "different" emphasis on proportionality would have changed the District Court's totality of the circumstances conclusion.

CONCLUSION

THEREFORE, the petition for certiorari should be denied.

Respectfully submitted,



Katharine I. Butler
University of South Carolina
School of Law
Corner of Green & Main St.
Columbia, SC 29208
(803) 777-4155

James S. Meggs
Counsel of Record
1737 Main Street
P.O. Box 147
Columbia, SC 29217
(803) 733-8247

Helen T. McFadden
201 Short Street
P.O. Box 1114
Kingstree, SC 29556
(803) 354-5200